## RECENT AMERICAN DECISIONS.

*Supreme Court of Michigan.*

### PINNEY v. CAHILL.

Books of science are not admissible in evidence to prove the opinion contained therein; but, where a witness has referred to them as authority, they may be properly received for the purpose of contradicting him.

ERROR to Oakland.

*A. C. Baldwin*, for plaintiff in error.

*Edward Cahill*, for defendant in error.

The opinion of the court was delivered by

GRAVES, C. J.—The defendant hired the plaintiff's horse to drive from Milford to Holley and back and the animal became sick and died. The plaintiff claimed that this was caused by defendant's ill-usage and neglect and he sued for damages. The jury found judgment against him and he brought this writ of error. Only two rulings are complained, of and both were made in admitting evidence. The defendant proved that he left Milford soon after nine o'clock in the morning to go to Holley, some fifteen miles away, in company with Clark Crawford, and stopped at Buckthorn to give the horse water. He offered to show a conversation which occurred at that place between himself and Crawford about the appearance and condition of the horse at that time; the object being to establish that he acted considerately and exercised due care and prudence. The plaintiff's counsel objected, but the court overruled the objection and we think rightly. What occurred at that time between Crawford and defendant in reference to the state and condition of the horse was pertinent and proper. It bore upon the questions whether the defendant was rash, heedless and indifferent, or awake, watchful and circumspect; and how he stood and acted in this respect, was involved in the case alleged against him. If he felt and acted as he ought, he was not liable.

The defendant gave evidence that on two former occasions the horse when driven by other persons fell sick of colic, and adduced other testimony to raise an inference that the horse's death was owing to the same difficulty. The plaintiff produced a witness who swore that he was a veterinary surgeon of twenty-five years stand-

ing, and his opinion as an expert being called for he swore that in his opinion the horse died from being overfed when too hot, which would produce colic. On cross-examination he said that colic was caused by over driving and feeding when the animal is too warm; that all works of good authority spoke of it and that the "Modern Horse Doctor, by Dr. Dodd," was a work of that kind. The defendant then offered to show from this work of Dr. Dodd, where the author treats of colic, the passage following: "In nine cases out of ten colic is the result of impaired digestive organs; the food runs into fermentation and evolves carbonic acid gas." This evidence was offered to discredit this expert in connection with his cross-examination. The plaintiff objected to its introduction but the court admitted it. The rule is acknowledged in this state that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it, and among others with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement on referring his learning to the books before mentioned and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of. *Ripon* v. *Bittell*, 30 Wis. 614; 2 Whart. on Ev., § 666.

We think the court committed no error and that the judgment should be affirmed with costs.

When may books of art or science be read in evidence to a court or jury for the purpose of proving the opinions of the writers as contained therein? This question will be answered in this note. As to books of exact science, there seems to be no question upon their admissibility. In such works, as has been well said, conclusions from certain and constant data are reached by processes too

intricate to be elucidated by a witness on the stand, and hence such evidence is the best that, on the subject, can be had. In *Wager* v. *Schuyler*, 1 Wend. 553, decided in New York in 1828, the question was as to the value of the interest of the tenant in dower of certain land. The Northampton Tables were introduced and received by the court to show the probable duration of life of the plaintiff. Again, in *Schell* v. *Plumb*, 55 N. Y. 598 (1874), an action was brought on a contract to support the plaintiff during her life. To estimate the probable duration of her life, the Northampton Tables were received in evidence. On appeal, this course was approved. "They were competent," said GROVER, J., "in connection with the proof given as to the health, constitution and habits of the plaintiff." In *Mills* v. *Catlin*, 22 Vt. 98 (1849), it was held by the Supreme Court of Vermont, that where the plaintiff proved an outstanding life estate, as a breach of the covenant of seisin, and gave evidence as to the age and general health of the tenant for life, and the annual value of the premises, it was not error for the court to allow Dr. Wigglesworth's Tables for estimating life to be used by the jury in estimating damages. In *Donaldson* v. *Missouri, &c., Railroad Co.*, 18 Iowa 291 (1865), the Carlisle Tables were admitted for the purpose of showing the expectation of human life. This action was against a railroad company to recover damages for the death of the plaintiff's intestate. And see *Baltimore, &c., Railroad Co.* v. *State*, 33 Md. 542 (1870); *David* v. *Railroad*, 41 Ga. 223 (1870); *Williams's Case*, 3 Bland Chanc. 221; *Rowley* v. *Railroad*, L. R., 8 Ex. 226. And so tables showing the rise and fall of the tide, at certain places and times, have been admitted: *Green* v. *Cornwell*, 1 City Hall Rec. 11 (1816).

It is, however, likewise ruled that though mortuary tables are admissible, they will not be allowed to control where their rules work manifest injustice. Thus, in a recent case in Pennsylvania (*Shippen's Appeal*, 2 Weekly Notes Cases 468), a husband and wife had executed a mortgage of the wife's land for the sum of $12,000. Of this sum the husband appropriated for his own use $4221, and afterwards made an assignment for the benefit of his creditors. After his wife's death the land was sold under the mortgage, after paying which there remained $12,000, which was claimed both by a devisee of the wife, and the husband's assignees. It was held by the Supreme Court that the value of the husband's estate, by the curtesy, was to be computed at one-third of the fee, and not according to the Carlisle Tables. "As to the measure of the life estate," said the court, "we say that the Carlisle Tables are not authoritative. They answer well their proper purpose to ascertain the average duration of life, so as to protect life insurers against ultimate loss upon a large number of policies, and thereby to make a profit to the shareholders. But an individual case depends on its own circumstances, and the relative rights of the life tenant and remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact. A court, therefore, must ascertain the actual probable expectations of life of the party as he is, or must adopt some recognised approximate standard as its legal measure, in order to capitalize the interest he is entitled to for life. In this case the Carlisle Tables, it is said, would give the value of the life estate or capitalized interest, at $6534.60, leaving the fee simple estate worth but $5202. This disproportion is quite manifest. We are, therefore, disposed to take the old common-law rule of one-

third of the whole sum as the present value of the accumulated interest for the life of (the husband). This gives a sum of several hundred dollars less than that received by him out of his wife's mortgage money."

Passing now to treatises on questions not within the domain of exact science, we find more difficult problems presenting themselves. "For several reasons," says Mr. Wharton, "treatises on such of the inductive sciences as are based on *data* which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises. In the first place a sound induction last year, is not necessarily a sound induction this year; and as a matter of fact, works of this class, when they do not become obsolete, are altered in material features from edition to edition, so that we cannot tell, in citing even from a living author, whether what we read is not something that this very author now rejects. In the second place, if such books are admitted as a class, those which are compilations must be admitted as well as those which contain the results of original research; the purely speculative must come in side by side with the empirical, so that if such treatises are admitted at all, it will be impossible to exclude those which are secondary evidence of the facts they state. In the third place such books, without expert testimony, cannot generally be pointed to the concrete case; with expert testimony they become simply part of such testimony, and lose their independent substantive character as books. In the fourth place the authors of such books do not write under oath, and hence write often tentatively; nor are they examined under oath, and hence the authorities on which they rest cannot be explored, nor their processes of reasoning tested. Lastly, such works are at the best hearsay proof of that which living witnesses could be produced to prove. Books of this class, therefore, though admissible, if properly authenti cated, to prove the state of science at a particular epoch, are inadmissible as independent substantive evidence to prove the facts they set forth:" Whart on Ev., sect. 665.

The earliest case in which a ruling is to be found excluding this species of evidence is *Collier* v. *Simpson*, 5 C. & P. 73, which was held at Nisi Prius, before Chief Justice TINDAL, in 1831. The action was one for slander, in charging the plaintiff, a physician, with malpractice in prescribing improper medicines for a child. The plaintiff proposed to show that his prescriptions were proper, and the doses not too large, and offered to put in evidence medical books of authority to show what was the received opinion on the subject in the medical profession. But the chief justice refused to receive the books in evidence, saying that physic depended so much on practice, but allowed the plaintiff to call as a witness a celebrated physician, Sir Henry Halford, who testified that he considered the medicine proper, and that it was sanctioned by the medical profession. The witness also testified that the writings of Dr. Merriman and Sir Astley Cooper were considered authorities in the medical profession. TINDAL, C. J., said: "I do not think that the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment, and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge."

In Massachusetts the same rule has been adhered to. *Ashworth* v. *Kittridge*, 12 Cush. 193, decided in 1853, was an action against a surgeon for malpractice; and on the trial, the plaintiff's counsel had been permitted against the defendant's objection, to read a number of medical books to the jury. In the Supreme Judicial Court this was held to be error. "It was," said Chief Justice

SHAW, "formerly practised rather by general indulgence and tacit consent of parties than in pursuance of any rule of law; but it has been frequently decided that it is not admissible, and we now consider the law to this effect well settled, both upon principle and authority. Where books are thus offered they are in effect used as evidence, and the substantial objection is that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination. If the same author were cross-examined, and called to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client or to court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas a medical witness would not only give the fact of his opinion and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it, in language intelligible to men of common experience. If it be said that no books should be read except works of good and established authority, the difficulty at once arises as to the question what constitutes 'good authority,' more especially whether it is a question of competency to be decided by the court, whether any particular book shall be received or rejected, or a question of weight of testimony, so that any book may be read, leaving its weight, force and effect to the jury. Either of the alternatives would be attended with obvious if not insuperable objections." The next case in this state arose a year later. In *Commonwealth* v. *Wilson*, 1 Gray 338 (1854), the prisoner was indicted for murder, and his counsel in opening his case proposed to read to the jury definitions of insanity from law books and also statistics on the subject from the same sources. But SHAW, C. J., refused. "Facts or opinions," said he, "on the subject of insanity, as on any other subject, cannot be laid before the jury, except by the testimony under oath of persons skilled in such matters. Whether stated in the language of the court, or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person not an expert. The principles governing the admissibility of such evidence have been fully considered by this court since the trial of Rogers, and the more recent English authorities are against the admission of such evidence." In *Washburn* v. *Cuddihy*, 8 Gray 430, decided in the same state in 1857, an action was brought for a breach of a warranty on a sale of a horse, the breach consisting in the horse being a "cribber." On the trial, the defendant's counsel contended that "cribbing" was not an unsoundness in a horse but a mere habit; and was proceeding to support his argument by reading from Dr. Dodd's Veterinary Surgeon, when he was stop-

ped by the court. The ruling was affirmed on appeal, THOMAS, J., saying: "In refusing to allow the counsel to read from works of medical or veterinary practice to the jury, the presiding judge conformed to the now well-settled practice in this Commonwealth," citing the earlier cases of *Ashworth* v. *Kittridge*, and *Commonwealth* v. *Wilson*. In *Whiton* v. *Albany, &c., Insurance Co.*, 109 Mass. 24, decided in 1871, a policy of marine insurance prohibited the vessel from visiting "guano islands." The ship had stopped at the island of Navassa, in the Caribbean sea, and the question was whether this island was called and known in commerce, trade, navigation, and the business of marine insurance as a "guano island." The defendant's counsel desired to read from Appleton's American Cyclopœdia, an article on the subject of guano on the islands of the Caribbean sea; but were not permitted by the trial judge to do so. On appeal the ruling was approved. Says GRAY, J.: "A book published in this country by a private person is not competent evidence of facts stated therein of recent occurrence, and which might be proved by living witnesses or other better evidence; and the book in question not being shown to have been approved by any public authority, or to be in general use among merchants or underwriters, had no tendency to show that the island of Navassa was commonly called and known as a guano island." In *The Commonwealth* v. *Sturtivant*, 117 Mass. 130 decided in the same state in 1875, the indictment was for murder, and it became important for the prosecution to show that certain blood stains were from human blood. An expert having testified on behalf of the prisoner that it was impossible to determine with certainty, in the case of a stain that had been dry upon clothing seven days, whether it was human blood, was asked if he concurred with the views expressed in Taylor's Medical Jurisprudence. The counsel then proposed that a certain paragraph upon that point from the book with which the witness concurred in opinion, should be read to the jury; but the court refused to allow it to be done. In the Supreme Court the ruling was approved, saying: "The refusal to allow a witness to read extracts from a work on medical jurisprudence was in accordance with the well-settled practice in this Commonwealth."

In *Fowler* v. *Lewis*, 25 Tex. 380 (1860), an action being brought for the price of a horse sold by the plaintiff to the defendant, the latter set up a false and fraudulent warranty in alleging that the animal was sound when he was affected with the "curb." A treatise on horses by Youatt, acknowledged to be a work of high authority, was offered to prove the nature of the disease known as the "curb," but was not permitted by the court to be read in evidence. In *Harris* v. *Panama Railroad Co.*, 3 Bosw. 7 (1858), a carrier being sued for the value of a horse injured while in transportation by rail, set up the defence that the horse was diseased. Youatt on Horses was again offered as an authority on the question, and again rejected. "The matters alleged in such a book as facts," said BOSWORTH, J., "when relevant to an issue to be tried, must be proved in the same manner as any other facts. The book itself is no evidence of their truth." In *Melvin* v. *Easby*, 1 Jones (N. C.) 387 (1854), the question was also as to the unsoundness of a horse, and the trial judge permitted counsel to read to the jury extracts from a book on the diseases of horses. On appeal this was held to be error, the court saying: "The rule is that professional books or books of science (*e. g.* medical books) are not admissible in evidence. * * * The reason of the rule is obvious, that if the authors were present, they could not be examined without being sworn, and exposed to a cross-examination. Their declarations or statements, whether merely

verbal, written or printed and published in books, are not admissible." And the same rule has been followed in Indiana: *Carter* v. *State*, 2 Ind. 617 (1851). In Rhode Island, in *State* v. *O'Brien*, 7 R. I. 336 (1862), a murder case, the court refused to permit Taylor's Medical Jurisprudence to be read to the jury. "The book offered to be read to the jury," said BRAYTON, J., "was not admissible as evidence. No evidence in the nature of parol testimony could properly pass to them except under the sanction of an oath; and upon this ground books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are admitted to give their opinions as experts, because given under oath; but the books which they write containing them are, for want of such oath, excluded."

It is clear, however, that the opinions contained in books may go to the jury through the mouth of a witness—an expert. Chief Justice TINDAL, in *Collier* v. *Simpson*, while ruling against the admissibility of the books themselves, thought it proper to permit the scientific witnesses to express, under oath, their opinions in the questions involved, though these opinions were based in some measure on books and not on actual practice. This rule has been adopted in many subsequent cases in this country. Thus, in *Carter* v. *State*, 2 Ind. 617, decided in Indiana in 1851, the prisoner being indicted for murder by poisoning, medical witnesses were permitted to testify as to the effect of poison on the system, from information derived from the writings of standard writers on the subject.

But the question most debated has been this one: may counsel, in addressing the jury, read to them approved scientific works as a part of their argument? Here we shall find a great difference of opinion, some courts holding in the affirmative, others in the negative, and others again taking the middle ground, that the practice is one allowable under certain circumstances to be decided by the trial court in its discretion. As has been well said, an able and diligent advocate could scarcely sum up a case of any magnitude, without repeating either from memory or from books, the principles bearing on the controversy, as laid down by the best authors. And where authorities are cited it is much better, in order to avoid mistake, that the books should be produced to speak for themselves, than that the matters stated in them should be taken from the mouth of the speaker: Graham and Wat New Trials 685. Instances of counsel in their speeches to the jury, reading from text books and treatises, are to be found outside of the reports. For cases in which Lord ERSKINE read to the jury, see Erskine's Speeches, vol. 1, pp. 75, 301, 423, 461, 501, 589. For American precedents, see Moore's American Eloquence, vol. 1, pp. 235, 342, 538, vol. 2, p. 242. Thomas Addis Emmett, in the case of Goodwin, indicted for manslaughter; John Adams and Josiah Quincy, in their defence of the British soldiers; Samuel Dexter and Daniel Webster in numerous cases exercised this right; and such has been the practice of such distinguished lawyers as S. S. Prentiss, Rufus Choate, James T. Brady, David P. Brown and Henry Clay. See *People* v. *Anderson*, 44 Cal. 65. Nevertheless, the judicial authority as contained in the reports is not at all harmonious.

It is held in England and in some of the American states, that in summing up their case to the jury, counsel are entitled to read from approved scientific works as a part of their argument. In *Reg.* v. *Courvoisier*, 9 C. & P. 362, tried before TINDAL, C. J., in 1840, the prisoner was indicted for the murder of Lord William Russell. The counsel for the prosecution, in his address to the jury,

alluded to the subject of circumstantial evidence, and was proceeding to read the observations of Chief Baron MACDONALD in *Patch's Case*, on the nature and effect of circumstantial evidence, when he was interrupted by the prisoner's counsel, who objected to the book being read. But the chief justice held the proceeding proper, saying: "He has a right to use them as his own opinions. There is no objection to his adopting them as part of his own speech." In *State* v. *Hoyt*, 46 Conn. 330 (1878), decided in Connecticut in 1878, the indictment was for murder; the defence insanity. As a part of the argument for the defence, the prisoner's counsel asked permission to read to the jury some abstracts from "Ray's Medical Jurisprudence of Insanity." The trial judge refused to allow the reading. On appeal this ruling was reversed. "The plea of insanity," said PARDEE, J., "interposed on behalf of persons intoxicated, is supported by the testimony of persons who, by study of books and men, have entitled themselves to speak as experts in that science. By way of vindication of their right to be heard as instructors of the jury, they usually preface their testimony by a statement of the extent of their experience in the treatment of persons afflicted with disease of the mind, and the time given to the reading of treatises upon insanity written by men of wide experience and acknowledged ability in the treatment of such diseases; their opinion is the result of observation of men, and reading of books. And in this jurisdiction for a long series of years counsel have been permitted to read to the jury, as a part of their argument, upon this part of their case, extracts from such treatises as, by the testimony of experts, have been accepted by the profession as authority upon that subject; such treatises as have helped to form the opinion expressed by the expert. The practice by repetition has hardened into a rule; a rule, upon the continued existence of which, counsel for the accused in the case before us had a right to rely; the abrogation of which, by the ruling complained of, may have been a surprise. The question is not, shall such reading be now for the first time permitted; it is, shall it now for the first time be forbidden without notice? We think that privileges hitherto granted to persons in like circumstances with the accused, should not be denied to him, to his possible prejudice." Two judges concurred in this opinion. LOOMIS, J. (PARK, C. J., concurring with him), dissented.

So in Iowa, Indiana, Alabama and some other states, the admission of such evidence is approved. *Bowman* v. *Woods*, 1 G. Greene 441, decided in 1848, was an action against a botanic physician for malpractice. On the trial the defendant offered to introduce certain medical books, which witnesses had testified to being standard works on botanic medicine, but the court excluded them. On appeal this was held to be error. "The authorities on this point," said GREENE, J., "are not uniform; but the district judge decided in conformity to the prevailing decisions of at least the English courts (citing *Collier* v. *Simpson*). Judge ABBOT, on the trial of Donal for poisoning, refused to appeal to the works of Thénard, and said: 'We cannot take the fact from any publication; we cannot take the fact as related by ny stranger' (Gay's Forensic Medicine 11). And Dr. Beck, in his excellent work on Medical Jurisprudence, states that in this country an objection has never been made to the introduction of authority, or the observation of others, as testimony by medical men. In this we think the author mistaken, for an appeal to medical authorities has been disallowed by some of the courts in this country; though physicians, when testifying, are permitted to refer to medical authors, and to quote their opinions from memory. Being

permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testifies as to his recollection of them from former reading. Is not the latter secondary to the former. On the whole we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice involved in a trial. This rule appears to us the most accordant with well-established principles of evidence." Subsequently a statute was passed making books of art and science competent evidence in this state. Rev. Stat. sect. 3995 of owa, provides: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." See *Broadhead* v. *Wiltse*, 35 Iowa 429 (1872). In *Cory* v. *Silcox*, 6 Ind. 39 (1854), decided in Indiana in 1854, the plaintiff in a suit for backing water by a dam, and injuring his mill, read, in his closing argument to the jury, extracts from "Evans's Millwright Guide." The court afterwards charged the jury on the subject in these words: "Extracts read from a scientific work are not of authority conclusively or *prima facie*. Like argument of counsel, or any other thing adduced to illustrate, they may be satisfactory to the jury or they may not." On appeal this was approved. "Reason," said the Supreme Court, "is neither more nor less than reason, because it happens to be read from a book; and we think we would be adopting a very difficult rule to enforce if we should attempt to compel counsel to use their own arguments for every position they might assume." In Alabama such evidence has been held admissible: *Soudenmeier* v. *Williamson*, 29 Ala. 558 (1857); *Merkle* v. *State*, 37 Id. 139 (1861). In the first case the book admitted was, "Acton on Venereal Diseases." In the second, "The U. S. Dispensary." In a capital case in Georgia, it was held not erroneous for the prisoner's counsel in the argument to read from Wills on Circumstantial Evidence, and on the other for the state's attorney to ridicule the work as mere fiction and romance: *Jones* v. *State*, 65 Ga. 506 (1880); and in Georgia and Massachusetts counsel have been permitted to read from law books in addressing the jury: *Powell* v. *State*, 65 Ga. 709 (1880); *Commonwealth* v. *Porter*, 10 Metc. 284 (1845); *Commonwealth* v. *Abbott*, 13 Id. 123 (1847).

The treatise which the counsel reads from must be a standard one. Therefore the proper practice is for the expert to be called to prove the authority of the book in the first instance: *State* v. *Hoyt*, 46 Conn. 330 (1878).

The courts of other states in which the subject has arisen, are either against this practice or else leave the matter to the discretion of the trial court. In *Luning* v. *State*, 1 Chand. 178 (1849), decided in Wisconsin in 1849, the trial was on an indictment for a nuisance in keeping a mill dam and so obstructing a stream as to overflow the land at certain places to the injury of the health of the inhabitants. Counsel proposed on the trial to read to the jury certain standard medical works as to the effect of malaria. The court refused permission. On appeal the Supreme Court refused to reverse the judgment on this ground. "This," said LARRABEE, J., "is a matter generally within the discretion of the court; and therefore not the subject of a writ of error. In many cases, no doubt, it would be proper to allow books of science to be read, though generally such a practice would lead to evil results. But certainly counsel have no right to read indiscriminately what books they

may choose, as is contended by the counsel for the plaintiff in error. The latitude to be given to counsel in argument is always under the control and in the discretion of the court." In Texas, the privilege of counsel, in addressing the jury, to read from legal authorities or works of general science, extracts pertinent to the case, in support of their argument, is held discretionary with the court. Said WHEELER, J., "It is a valuable privilege. * * * Yet this privilege is so susceptible of abuse that the extent and manner of its exercise must be intrusted, in a great measure, to the sound discretion of the court. It is more reasonable to suppose the court will not abridge it improperly, than that the advocate, actuated by the strong desire for success and triumph over his adversary, will not abuse it." The action had been brought for the breach of warranty of soundness of a slave. The question was whether the slave had died of heart disease, and the defendant's counsel in his address to the jury was preparing to read from and comment upon a work entitled "Hope on the Heart," but was prevented by the trial judge: *Wade* v. *DeWitt*, 20 Tex. 398 (1857). In Ohio, a similar opinion has been expressed. In *Legge* v. *Drake*, 1 Ohio St. 287, decided in that state in 1853, the defendant's counsel, during his argument to the jury, desired to read from Youatt on Veterinary Surgery, but the plaintiff's objection was sustained. On appeal the Supreme Court said: "The question presented is not whether standard books on matters of science and art, when pertinent, can be proven, and given in evidence on the trial of the cause, but whether counsel, in their address to the jury, have a right by way of argument or illustration to read extracts from works on science not given in evidence. While the right of a party to be heard by his counsel on the trial of his cause is not to be questioned, and is often of great service in the investigation of questions, both of law and of fact, yet inasmuch as this privilege may be liable to abuse, to the great hindrance and annoyance of courts, in the progress of business, the extent and manner of its exercise must in some measure rest in the sound discretion of the court. Although unlimited license in range and extent is not allowed to counsel in their addresses to the court and jury, yet no pertinent and legitimate process of argumentation within the appropriate time allowed, should be restricted or prohibited. And it is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it was repeated by counsel from recollection or read from a book. It would be an abuse of this privilege, however, to make it the pretence of getting improper matter before the jury as evidence in the cause." And the rule of discretion seems to be adopted in California. In *People* v. *Anderson*, 44 Cal. 65 (1872), it was said: "As a general rule, the practice of allowing counsel, in either a civil or criminal action, to read law to the jury is objectionable, and ought not to be tolerated. Its usual effect is to confuse rather than to enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions or to take the law of the case from the books rather than from the court." But in California, in a very recent case, *People* v. *Wheeler*, 8 Pac. C. L. J. 581 (1882), the rule excluding the reading of scientific treatises to the jury has been followed. This was a criminal case, in

which the district attorney on the argument had been permitted to read to the jury certain extracts from "Brown on Insanity." No evidence had been adduced that the book was a standard authority, and on this ground the decision of the Supreme Court was placed. But from the language used by the judge who delivered the opinion, it would appear that had this evidence been forthcoming, it would still have been error in the court below to have allowed the book to be read to the jury. "The expert" said the Supreme Court "is called to assist the jury in reaching a just conclusion; his testimony is necessarily subject to the supervision of the jury. They must determine not only whether the hypothetical case on which his opinion is based is the case before them as established by credible testimony, but must consider the reasons he has given for his opinions, and by his whole testimony test his credibility and the correctness of his judgment. Inasmuch as the circumstances on which the jury are to determine the weight to be given the opinion of an expert are more numerous and complicated than those by reference to which they are to decide on the consideration to be afforded to the statements of a witness with respect to facts and influences involved, if any, which are within the reach of those possessed of no special or scientific acquirements, it follows that it is peculiarly important that a defendant charged with crime should be confronted by the expert witnesses against him, and that they should be cross-examined in his presence. But where the opinions of a writer as to the presence or absence of insanity upon facts more or less analogous to those claimed by the prosecution or defence to be established in the case, are permitted to go to the jury, the writer is not sworn or cross-examined at all. Such evidence is equally objectionable whether introduced by the people or by the defendant. If held admissible the question of insanity may be tried not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories. In the case before us, too, there was no evidence that the work from which the district attorney read various sections, was a standard authority in the medical profession, or that the author was an expert."

*Ordway* v. *Hughes*, 50 N. H. 159 (1870), a New Hampshire case, indicates that such a practice is not permitted at all in this state. This was an action against a surgeon for malpractice, by which in setting a fractured bone, the lower portion of the fractured bone was pushed up and lapped by the upper portion, thereby causing a shortening of the limb. In opening the case to the jury the plaintiff's counsel offered to exhibit to them an engraving in a medical book, as a chalk, to exhibit his meaning. This the court refused to allow. On appeal the ruling was sustained, the Supreme Court holding that although a chalk or engraving might properly be exhibited to the jury as an illustration, yet it was not proper to exhibit it *as taken from a medical book*, for this would give it an undue importance in the minds of the jury. Said SARGENT, J., "The engraving that was offered as a chalk taken alone was not objectionable. The witness may use, to illustrate his meaning, and the counsel to illustrate his case, any chalk, whether engraved or more roughly sketched, whether made with a pen, a pencil, a paint brush, a coal or a piece of chalk. If the diagram alone were offered, and offered simply as a chalk, we see no objection to it. But when it was offered, as the case shows this was, 'as an engraving in a medical book,' that makes it at once improper as evidence, because that gives it an undue importance with the jury. The jury should not know that it was in a medical book, or a law book, or what the book was that contained it. In fact if it was to go to the jury as a chalk, it should

not be in any book, for that simple fact might lead the jury to attach an undue importance to it. If the jury are to be told that the engraving shown them is taken from a medical book or was got up by some distinguished doctor or man of science, it might give it a weight, an authority with the jury, which no mere chalk was designed to have or would have. This is a matter which must be left to the discretion of the court. An engraving may be as good a chalk as anything, but it should not be attached to or contained in any book, nor should the jury be told from what book it was taken, or that it ever was in any book, and nothing should be said about it only that it is to be used as a sketch or chalk to illustrate the case. Where it is offered as a part of a medical book or as the work of some distinguished man, then the presiding judge should exclude it, is he did in this case very properly. But when separated from everything else and offered by the counsel or a witness simply as a chalk, with nothing said as to whence it came from or who made it, then we see no objection to it on the ground that it was engraved or painted, unless there was something about it that the court could see was calculated to mislead the jury. We think this matter must and ought to be left to the presiding justice to decide, as one of the matters in his discretion. In this case we see no reason why the discretion was not properly exercised." In Illinois the question has hardly been squarely decided. *Yoe* v. *The People*, 49 Ill. 411, was a murder case which was tried in 1868. The prosecuting attorney was permitted against the objections of the prisoner to read to the jury copious extracts from medical works, which had not been introduced in evidence, and which had not been proved to be authorities, and to state to the jury that what he had read was authority upon the subject of poisoning by arsenic. The Supreme Court held this to be improper, but added: "If the state's attorney in such a case, or in any case, read from medical books in his argument to the jury, the court should instruct them that such books are not evidence but theories simply of medical men." In *Gale* v. *Rector*, 5 Bradw. 481 (1879), decided in one of the appellate courts in 1879, the question was whether a surgeon had treated the defendant's wife in a proper manner. Upon this question, the defendant's counsel was permitted to read an extract to the jury from Gross on Surgery. This was held to be erroneous.

A leading English case on this subject deserves in this place a review of some length. There it was held that counsel in addressing the jury are allowed to read from or refer to printed books for the purpose of showing the opinions of authors or others on particular subjects. But they cannot do so for the purpose of proving facts: *Darby* v. *Ousely*, 1 H. & N. 12 (1856). The action was for a libel contained in an article entitled "A Papal Rebel in Her Majesty's Service." In his address to the jury the defendant's counsel proposed, in order to show the doctrine of the church of Rome with respect to heretics, to read certain canons and decrees of that church, viz.: those of the Councils of Lateran, Arles, Sens and Trent; also a paragraph from a book published by a Roman Catholic priest in 1822, entitled, "Development of the Church of Rome in Ireland;" also to read from histories the excommunication by the Popes of various heretical sovereigns; also to read the bull "In Cœna Domini," read every Maundy Thursday at Rome by the Pope; also the oath of a Roman Catholic Bishop, from the Pontificale Romanum, and some of the notes to the Testament published by the Catholic College of Rheims in 1852. The court refused to allow him to read any of these documents, being of opinion that if they were of authority in Catholic

countries, they ought to be proved as foreign law. In moving for a new trial, the counsel said: "These documents were not intended to be referred to as evidence, but only as illustrating the doctrines by which the plaintiff acknowledged himself bound. The works of Hume, Paley, Bolingbroke, Bacon, &c., are frequently cited as illustrating certain themes. On the trial of O'Connell in Ireland, in 1843, his counsel read to the jury extracts from newspapers published in 1831, containing accounts of political meetings at Birmingham, &c., and also speeches in Parliament." But POLLOCK, C. B., replied: "In *Rex* v. *Hone*, which was tried before Lord ELLENBOROUGH, the defendant cited numerous authors for the purpose of showing that parodies, instead of being a contempt of the thing parodied, were a tribute to its merit. He showed that Luther had parodied the Lord's Prayer, and Addison the Creed. Standard authors may be referred to for such a purpose, or as showing the opinions of eminent men on particular subjects, *but not to prove facts.*" On further consideration, all the judges thought the ruling correct. "No doubt under certain circumstances," said the Chief Baron for the whole court, "as in *Hone's Case*, counsel and defendants have been permitted to refer very largely to printed works. If a question arose as to composition for the purpose of showing that a particular expression was not in reproach, but laudatory; or that certain words were not used in an ironical sense; works in prose and verse may be referred to. On the trial of Mr. O'Connell very large quotations were made from books and speeches; so also, in an information against John and Leigh Hunt, for a seditious libel, Lord BROUGHAM quoted several books not in evidence; but when on a subsequent occasion he proposed to read books for the purpose of proving facts, Lord ELLENBOROUGH interrupted him, saying, that he might refer to particular writers upon general subjects, but that he could not bring forward their statements to prove facts. It could never be supposed that books might be referred to for the purpose of proving the best mode of conducting agriculture. If a landlord complained of a farmer for not properly cultivating his land, he could not refer to books in order to show in what way the land ought to be cultivated, for that must be proved before the jury, who are sworn to try *secundum allegata et probata.* So in an action on a warranty of a horse, it would not be allowable to refer to works of a veterinary surgeon, in order to show what is unsoundness. In this case, the defendant's counsel proposed to read certain specific canons, not as matters of speculative opinion, but as Canons of the Church of Rome, promulgated by authority and sanctioned by the Pope in council. These are matters of fact, and if of any authority, ought to have been proved. The learned counsel was opening a case for the defendant which consisted merely of observations on facts already proved; for he had announced his intention not to call witnesses, and, therefore, could not afterwards be allowed to do so. Then he proposed to read from various histories, the excommunication by the Popes of heretical sovereigns, and also to read the bull 'In Cœna Domini.' The learned judge very properly ruled that he might refer generally to the fact that Popes have excommunicated sovereigns, but that he had no right to read the terms of a specific bull, as that was a matter to be proved. It is the same with respect to the Pontificale Romanum, and the notes to the Rheims Testament. In short, the defendant's counsel wanted to prove certain facts; he opened them as facts, and supposed that because he could find them in certain documents and books, he was relieved from the necessity of calling witnesses to prove them, thereby avoiding a reply."

But there is one purpose for which, according to the principal case, books of science may be read *in evidence*, viz.: to contradict a witness who has testified concerning statements alleged by him to be contained in the book. The leading case of *Pinney* v. *Cahill*, lays down this exception, and its conclusion is fortified by the earlier case of the *City of Ripon* v. *Bittel* (30 Wis. 619), decided in Wisconsin in 1872.

JOHN D. LAWSON.

St. Louis, Mo.

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*Supreme Court of Illinois.*

## CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* JOHNSON, ADMINISTRATRIX.

Negligence is the opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others.

To maintain an action for negligence, there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff.

In their legal sense the words "ordinary negligence mean the want of ordinary diligence, and are to be distinguished from the words "slight negligence," which mean the want of great diligence, The doctrine of comparative negligence applies only to cases of slight negligence, and it is therefore error to instruct the jury that plaintiff though guilty of ordinary negligence may yet recover if his negligence was slight in comparison with defendant's gross negligence.

The speed of a railway train is a subject upon which any one is entitled to express an opinion, the jury being presumably able to estimate such opinion for what it is worth.

ERROR to Kendall county.

The opinion of the court was delivered by

SCHOLFIELD, J.—The declaration contains two counts. In the first, the allegation is general that the defendant negligently drove and managed its locomotive, etc. In the second, the negligence alleged is in driving its engine, etc., at a rate of speed prohibited by an ordinance of the town of Plano.

At the time he received the fatal injury, plaintiff's intestate was in the employ of a firm engaged in the manufacture of the Marsh Harvester, at the shops of the company of that name at Plano. For the convenience of those in charge of these shops, a switch had been laid on the grounds of the Marsh Harvester Company, connecting with defendant's main track, which was used by those in charge of the shops for unloading materials shipped to the shops and for loading machines to be shipped from the shops. In one of